IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number 91-11127
JOE JUDSON	)	
	)	
Debtor	)	
	)	
	)	
BANKERS FIRST FEDERAL SAVINGS	)	FILED
AND LOAN ASSOCIATION	)	at 5 O'clock & 13 min. P.M.
	)	Date: 1-17-92
Movant	)	
	)	
vs.	)	
	)	
JOE JUDSON	)	
	)	
Respondent	)	

ORDER

Debtor, Joe Judson, objects to the proof of claim filed by Bankers First Federal Savings and Loan Association ("Bankers First"). Bankers First moves for relief from stay to dispose of collateral it repossessed prepetition. Hearing was held September 17, 1991. Based on the evidence presented at hearing and relevant legal authorities, I make the following findings.

FINDINGS OF FACT

On June 6, 1988 debtor and Bankers First entered into a loan agreement whereby debtor borrowed from Bankers First Forty-

Eight Thousand Twenty-Four and 01/100 ($48,024.01) Dollars. Pursuant to a security agreement contained in the loan agreement debtor granted Bankers First a security interest in a Porsche automobile. The security agreement provided in pertinent part that, "I [debtor] will not sell the Collateral pledged as Security . . .. give it away or lease it without your [Bankers First's] written permission . . . I will be in default under this Agreement if . . . I violate or fail to comply with or perform any of the other terms of this Agreement." By a "substitution of collateral agreement" in lieu of the original collateral securing the obligation under the loan agreement, Bankers First retained a security interest in a 1989 BMW sedan, serial No. WBAAD2303K8845524, a 1975 Ford Bronco, serial No. U15GLWO1535, a 1987 Mitisubishi tractor, serial No. 13506, a 1987 Jason 18-foot ski boat, serial No. J00511E687 with a drive-on trailer and 200 horsepower Mercury motor, model No. 135&1 (the "boat, motor and trailer"), a savings account at Bankers First, account No. 901981, and a Bobcat Case Uniloader, serial No. 0017168411 with case attachment, serial No. X1257955X.

In December 1989, Debtor sold the boat, motor and trailer to Mr. Jon Dale Ferguson for Seven Thousand Five Hundred and No/100 ($7,500.00) Dollars without the authorization of Bankers First. Debtor also sold the Bobcat Case Uniloader without authorization by Bankers First. Debtor did not apply the proceeds of the collateral to his obligation under the loan agreement. Under the terms of the

security agreement, debtor's sale of collateral securing the obligation to Bankers First constituted a default by the debtor. In August 1990, Bankers First repossessed the boat, motor and trailer from Mr. Ferguson. Following the repossession, on August 6, 1990 debtor filed a joint Chapter 13 petition with his wife,!Barbara Judson. The case was converted to a Chapter 7 proceeding on December 11, 1990. On April 12, 1991 the debtor received a discharge in his Chapter 7 case. Bankers First participated as a creditor in debtor's previous case and received notice of debtor's Chapter 7 discharge.

Debtor filed this Chapter 13 petition on June 25, 1991. Bankers First filed a proof of secured claim for Forty Thousand Eighteen and 96/100 ($40,018.96) Dollars, which is the outstanding balance on debtor's obligation under the loan agreement. Bankers First retains possession of the boat, motor and trailer. Bankers First has retained possession of the boat, motor and trailer since the time of the repossession and has taken no steps to dispose of the collateral. Bankers First has not notified debtor that it desires to retain the collateral in satisfaction of debtor's obligation under the loan agreement. At hearing, debtor produced evidence that the value of the boat, motor and trailer at the time of repossession was Six Thousand Five Hundred and No/100 ($6,500.00) Dollars, and the value at the time of hearing on debtor's objection to claim was Six Thousand and No/100 $6,000.00) Dollars. Debtor

objects to Bankers First's proof of claim contending Bankers First's retention of the boat, motor and trailer satisfies debtor's obligation under the loan agreement; and therefore, Bankers First has no claim in this Chapter 13 case.

CONCLUSIONS OF LAW

Debtor sold the boat, motor and trailer, and unildader to third parties prior to filing his first Chapter 13 petition. As debtor owned no interest in these items of collateral at the commencement of his first Chapter 13 case and did not require an interest in these items of collateral thereafter, the collateral was not property of debtor's bankruptcy estate in the prior bankruptcy case. See 11 U.S.C. §541(a). The automatic stay of §362(a) does not apply to property in which the debtor has no interest. Bankers First is free to pursue its remedies under the loan agreement and Georgia law with respect to the collateral in which debtor has no interest, and was free to do so during debtor's prior case. Therefore, Bankers First's motion for relief from stay is inappropriate.

Debtor's personal liability on the debt to Bankers First was discharged pursuant to this court's discharge order entered in debtor's Chapter 7 case. 11 U.S.C. §727(b). However, the validity of Bankers First's lien against the property in which it holds a security interest is unaffected by the discharge and constitutes an allowable secured claim in this Chapter 13 case to the extent of the

value of the collateral in which the debtor retains an interest. Johnson v. Home State Bank, ___ U.S. ___, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). At hearing I determined the value of the property to which Bankers First claims a security interest in debtor's possession and to which he holds an interest at Twenty-One Thousand Five Hundred and No/100 ($21,500.00) Dollars.

Debtor objects to the claim of Bankers First contending the obligation under the loan agreement was satisfied by Bankers First's retention of the boat, motor and trailer. Debtor argues that under Official Code of Georgia Annotated (O.C.G.A.) §11-9505(2) and Bradford v. Lindsey Chevrolet Co., 161 S.E.2d 904 (Ga. App. 1968), Bankers First's retention of the collateral without disposing of it constitutes satisfaction of the underlying debt. Debtor also argues that Bankers First's retention of the boat, motor and trailer without disposing of it was commercially unreasonable. Debtor contends that under the rule stated in Contestabile v. Business Development Corp., 387 S.E.2d 137 (Ga. App. 1990), Bankers First's commercially unreasonable conduct bars it from seeking a deficiency on the obligation under the loan agreement thereby releasing any other collateral securing the obligation.

Under Georgia law a secured party has the right to repossess its collateral upon default. O.C.G.A. §11-9-503.[1] Georgia law permits certain methods of disposition of collateral

[1]Debtor does not dispute the fact that he defaulted under the terms of the loan agreement and that Bankers First had the right to repossess the boat, motor and trailer, or that the repossession itself was conducted in a lawful manner.

by the secured party following repossession, see O.C.G.A. §11-9-504(1), or retention of the collateral in satisfaction of the obligation secured by the collateral. O.C.G.A. §11-9-505(2). Section 11-9-505(2)[2] provides that, following default, a secured party in possession of the collateral may propose to retain the collateral in full satisfaction of the underlying obligation, subject to objection by the debtor or other interested party. The election to retain the collateral in satisfaction of the debt pursuant to O.C.G.A. §11-9-505(2) is permissive and the creditor's intention to elect this remedy is shown by written notification to the debtor of the proposed retention. See footnote 2. There is no evidence before me that Bankers First proposed to retain the boat, motor and trailer in

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[2]O.C.G.A. §11-9-505(2) provides in pertinent part as follows:

> In any case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. . . . If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under Code Section 11-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

satisfaction of debtor's obligation under the loan agreement pursuant to O.C.G.A. §11-9-505(2). Cf. McCullough v. Mobiland. Inc., 228 S.E.2d 146, 149 (Ga. App. 1976). O.C.G.A. §11-9-505(2)ldoes not apply in this case.

Under Georgia law a secured party may by its conduct imply its intention to rescind the contract and retain collateral securing the obligation under the contract in full satisfaction of the obligation. See. e.g., Bradford, supra. Thus, "where a creditor repossesses and retains collateral as his own, without any excuse for failing to dispose of the goods, and does not demand payment of the contract, such actions may constitute a rescission of the contract by the creditor." ITT Terryphone Corp. v. Modems Plus, Inc., 320 S.E.2d 784, 787 (Ga. App. 1984). "[T]he essence of the cases declaring a rescission of a contract have all involved either creditor misbehavior or other conduct inconsistent with the rights established by the contract." McCullough, supra, at 148. Bankers First's retention of the boat, motor and trailer standing alone is insufficient to establish a recision of the loan agreement. No evidence has been presented that Bankers First affirmatively rescinded the loan agreement or otherwise acted in a manner inconsistent with its rights under state law and the loan agreement. See id.

Regardless of the manner of disposition of collateral chosen by the secured party, any action (or inaction) by the secured

party with respect to collateral in its possession must

be commercially reasonable. See O.C.G.A. §11-9-504(a). "Once a creditor has possession [of the collateral] he must act in a commercially reasonable manner toward sale, lease, proposed retention, where permissible, or other disposition. . . ." Henderson Few & Co. v. Rollins Communications, 250 S.E.2d ~30, 832 (Ga. App. 1978) [quoting Michigan Nat. Bank v. Marston, 185 N.W.2d 47, 51 (Mich. App. 1970)]. Debtor contends that a determination by this court that Bankers First's retention of the boat, motor and trailer was not commercially reasonable bars Bankers First from seeking a deficiency thereby releasing all other collateral securing the obligation. Debtor's reliance on Contestabile, supra, is misplaced. In Contestabile, the Georgia Court of Appeals reaffirmed that where a creditor conducts a commercially unreasonable sale of repossessed collateral, or a sale of collateral without notice to the debtor, a rebuttable presumption arises that the collateral sold is equal to the indebtedness. Contestabile, supra, at 137; see also Emmons v. Burkett, 256 Ga. 853, 353 S.E.2d 908 (1987). "[I]f the creditor conducts a commercially unreasonable sale, he or she is barred from proceeding against other collateral pledged for the debt and/or from seeking a deficiency judgment against the debtor. . . ." Contestabile, supra at 137. The purpose of the commercial reasonableness and notice requirements, see O.C.G.A. §11-9-504(3), is to "allow the debtor to minimize any deficiency for which he will

be liable by maximizing the sale price of the collateral." U.S. on Behalf of Farmers Home Admin. v. Kennedy, 256 Ga. 345, 348

S.E.2d 636, 637 (1986). See also Reeves v. Habersham Bank, 254 Ga.l615, 331 S.E.2d 589 (1989). In this case there has been no sale. lHowever, this does not mean that if a secured party impairs the debtor's position by retaining the collateral without disposition or returning the collateral to the debtor that the debtor is without a remedy. See generally Henderson Few, supra, at 832-33.

Once the secured party is in possession of the collateral, it must act in a commercially reasonable manner toward disposing of the collateral or proposed retention in satisfaction of the obligation. See id.; ITT Terryphone, supra, at 786-87. "If such disposition is not feasible, the asset must be returned [to the debtor], still subject, of course, to the creditor's security interest. To the extent the creditor's inaction results in injury to the debtor, the debtor has a right of recovery." Henderson Few, supra, at 832 [quoting Michigan Nat. Bank, supra, at 51]. The debtor's right of recovery is not, however, satisfaction of the underlying obligation. Rather,

> [i]f . . . it is established that [the secured party did not act in a commercially reasonable manner, the balance of the indebtedness owed by [the debtor] on the [contract] should be reduced by the value of the [collateral] at the time it was repossessed plus the amount of any damage sustained by [the debtor] as a result of the [secured party's] inaction in returning or disposing of the goods. In other words, [the debtor's] obligation on the indebtedness may be
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> reduced by the amount of 'any loss caused by [the secured party's] failure to [act in a commercially reasonable manner].'

ITT Terryphone, supra, at 787 (citations omitted) [quoting O.C.G.A. §9-11-507(1)].

The burden of proof on the issue of commercial reasonableness rests with the secured party. Granite Equipment Leasing Corp. v. Marine Development Corp., 230 S.E.2d 43 (Ga. App. 1976). Whether Bankers First acted in a commercially reasonable manner in retaining the collateral is a question of fact. ITT Terryphone, supra, at 787.

Bankers First repossessed the boat, motor and trailer in August 1990 and did nothing other than hold the collateral. Bankers First made no effort to dispose of the collateral. It argues that debtor's bankruptcy cases prevented it from proceeding. However, Bankers First did not seek relief from stay to sell the collateral until July 15, 1991.[3]0.Assuming that in the first case the §362(a) stay applied to the boat, motor and trailer, on April 12, 1991, the date of discharge in the first case, any applicable stay as to this property dissolved. 11 U.S.C. §362(c)(2)(C).[4] Furthermore, Bankers First failed to take steps pursuant to State law to dispose of the collateral after receiving notice of debtor's Chapter 7 discharge.[5] Bankers First

[3]In debtor's previous bankruptcy case Bankers First sought relief from stay to dispose of the boat, motor and trailer. On the day set for hearing the case was converted to a Chapter 7 case and the hearing was continued to allow the Chapter 7 trustee to be served with notice of the motion and participate in the hearing. Following conversion, Bankers First filed another motion for relief from stay. At hearing, Bankers First failed to appear and prosecute its motion. Accordingly, I entered an order denying the motion.

[5]Assuming that in the first case the §362(a) stay applied to the boat, motor and trailer, on April 12, 1991, the date of discharge in the first case, any applicable stay as to this

failed to prove that it acted in a commercially reasonable manner in retaining the collateral since the repossession in August 1990. Therefore, debtor is entitled to a reduction in the amount of the debt due under the loan agreement equal to the value of the boat, motor and trailer at the time of the repossession, plus any damages sustained by debtor as a result of Bankers First's retention of the collateral. ITT Terryphone, supra, at 787.

The indebtedness owed Bankers First based on the loan agreement, as reflected in the proof of claim, is Forty Thousand Eighteen and 96/100 ($40,018.96) Dollars. The value of the boat, motor and trailer at the time of the repossession was Six Thousand Five Hundred and No/100 ($6,500.00) Dollars. The only evidence of damage resulting from Bankers First's inaction presented is that the boat, motor and trailer depreciated Five Hundred and No/100 ($500.00) Dollars while in the possession of Bankers First. However, because Bankers First's claim in this Chapter 13 case is limited to the value of its collateral in debtor's possession, Twenty-One Thousand Five Hundred and No/100 ($21,500.00) Dollars[6], any reduction of the balance due on the obligation under the loan agreement, Forty Thousand Eighteen and 96/100 ($40,018.96) Dollars, by the value of the boat, motor and trailer at the time of repossession is insufficient to reduce the obligation to an amount

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property dissolved. 11 U.S.C. §362(c)(2)(C).

[6]The personal obligation of the debtor to pay the debt due Bankers First was discharged in debtor's Chapter 7 case.

less than the value of the remaining property securing the claim. Therefore, Bankers First retains a secured claim in this Chapter 13 case equal to the value of its remaining collateral to which the debtor claims an interest.

It is therefore ORDERED that debtor's objection to claim is overruled;

further ORDERED that Bankers First's motion for relief from stay is denied as moot;

further ORDERED that Bankers First's claim is allowed as a secured claim of Twenty-One Thousand Five Hundred and No/100 ($21,500.00) Dollars with the balance of the claim disallowed as a previously discharged debt.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 17th day of January, 1992.